

***Case M.7612 -  
HUTCHISON 3G UK /  
TELEFONICA UK***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

---

Article 9(3)

Date: 4 December 2015

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

EUROPEAN  
COMMISSION

Brussels, 4.12.2015  
C(2015) 8534 final

*Public Version*

COMMISSION DECISION

**of 4.12.2015**

**relating to Article 9 of Regulation (EC) No 139/2004  
referring to case M.7612 - HUTCHISON 3G UK / TELEFONICA UK**

(Only the English text is authentic)

# COMMISSION DECISION

of 4.12.2015

**relating to Article 9 of Regulation (EC) No 139/2004  
referring to case M.7612 - HUTCHISON 3G UK / TELEFONICA UK**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")<sup>1</sup>,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings<sup>2</sup> (the "Merger Regulation"), and in particular Article 9(3) thereof,

Whereas:

## 1. INTRODUCTION

- (1) On 11 September 2015, the Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking CK Hutchison Holdings Limited ("CKHH"), through its indirect subsidiary Hutchison 3G UK Investments Limited (the "Notifying Party"<sup>3</sup>), acquires, within the meaning of Article 3(1)(b) of the Merger Regulation, control of the whole of the undertaking Telefónica Europe Plc ("O2"), by way of a purchase of its shares (the "Transaction").<sup>4</sup> O2 and the Notifying Party will be referred to collectively as the "Parties".
- (2) The United Kingdom, via the Competition and Markets Authority ("CMA"), received a copy of the notification on 14 September 2015.
- (3) By letter dated 2 October 2015, the United Kingdom, via the CMA, requested the full referral of the Transaction to its competition authority with a view to assessing the Transaction under its national competition law, pursuant to Article 9(2)(a) of the Merger Regulation ("the Referral Request").
- (4) The Notifying Party was formally informed of the Referral Request by the Commission by way of a letter dated 6 October 2015 and it submitted its comments on 17 October 2015.

---

<sup>1</sup> OJ C115, 9.8.2008, P.47.

<sup>2</sup> OJ L 24, 29.1.2004, p.1. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>3</sup> For simplicity in the following the term "Notifying Party" will be used to refer to both Hutchison 3G UK Investments Limited, CKHH and the other subsidiaries of the latter.

<sup>4</sup> OJ C 310, 19.09.2015, page 5.

- (5) After a preliminary examination of the notification and based on the first phase market investigation, the Commission concluded that the Transaction raised serious doubts as to its compatibility with the internal market as regards the market for retail mobile telecommunications services and the market for wholesale access and call origination services and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 30 October 2015.
- (6) On 5 November 2015, the United Kingdom, via the CMA, submitted a reminder of the Referral Request. On 11 November 2015, the Commission informed the Notifying Party that the United Kingdom had submitted a reminder regarding the Referral Request. On 19 November 2015, the Notifying Party submitted additional comments.
- (7) The United Kingdom was informed by way of letter dated 16 November 2015 of the Commission's intention to reject its Referral Request. The CMA submitted its comments on 20 November 2015.

## **2. THE PARTIES AND THE CONCENTRATION**

- (8) Hutchison 3G UK Investments Limited is an indirect wholly owned subsidiary of CKHH. CKHH is a multi-national group headquartered in Hong Kong and listed on the Hong Kong Stock Exchange. CKHH has five core businesses in the following sectors: ports and related services, retail, infrastructure, energy, and telecommunications.
- (9) CKHH's indirect wholly owned subsidiary, Hutchison 3G UK Limited ("Three") is a mobile network operator in the United Kingdom. Three offers mobile telecommunications services such as voice, SMS, MMS, mobile internet, mobile broadband, roaming and call termination services.
- (10) O2 is also active in the United Kingdom and offers mobile telecommunications services such as voice, SMS, MMS, mobile internet, mobile broadband, roaming and call termination services. O2 belongs to Telefónica S.A. ("Telefónica"), a holding company of a group of companies that operate fixed and mobile communication networks.
- (11) On 24 March 2015, Hutchison 3G UK Investments Limited, Hutchison 3G UK Holdings (CI) Limited (a parent company of Hutchison 3G UK Investments Limited and under the sole control of CKHH), and Telefónica entered into a Sale and Purchase Agreement under which Hutchison 3G UK Investments Limited acquires the entirety of O2's issued share capital for a consideration of GBP 9.25 billion.<sup>5</sup> The Transaction consists of an acquisition of sole control by Hutchison 3G UK Investments Limited over O2 and accordingly constitutes a concentration within the meaning of Article 3(1)(b) Merger Regulation.

---

<sup>5</sup> If certain cash flow targets of the combined business are met, an additional consideration of maximum GBP 1 billion will also become payable. See paragraphs 2 and 3 of Schedule 7 of the Sale and Purchase Agreement.

### 3. EU DIMENSION

- (12) In the financial year preceding the notification (2014), the undertakings concerned had a combined aggregate world-wide turnover of more than EUR 5 billion. The calculation is based on the turnover figures of Cheung Kong Holdings Limited ("CKH") and Hutchison Whampoa Limited ("HWL"), two companies that are currently wholly owned by CKHH, as well as those of O2 (CKH: EUR 3 880 million, HWL: EUR 32 831 million, O2: EUR [...]<sup>6</sup>). Each of these companies had an EU-wide turnover in excess of EUR 250 million in 2014 (CKH: EUR [...] million, HWL: EUR [...] million, O2: EUR [...] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
- (13) The Transaction therefore has an EU dimension within the meaning of Article 1 of the Merger Regulation.<sup>7</sup>

### 4. ASSESSMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

#### 4.1. Introduction

- (14) Pursuant to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of a case to the competent authorities of the Member State concerned with a view to the application of that Member State's competition law, if the conditions laid down in Article 9(2)(a) of the Merger Regulation are met, that is to say, if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.
- (15) Moreover, pursuant to Article 9(3) of the Merger Regulation, the Commission has to analyse whether it is appropriate to refer a given case to a national competition authority. The Commission therefore retains a margin of discretion in deciding whether to refer a case or not.<sup>8</sup> In exercising such discretion the Commission will take into account the need to ensure effective protection of competition in all markets affected by the transaction.<sup>9</sup> The Commission exercises that discretion taking into account the criteria set out in the case law and the Referral Notice.<sup>10</sup>
- (16) In the following sections, the Commission considers whether the criteria of Article 9(2)(a) of the Merger Regulation are fulfilled (section 4.2) and then it assesses

---

<sup>6</sup> Turnover calculated in accordance with Article 5 of the Merger Regulation.

<sup>7</sup> Prior to 3 June 2015, CKHH indirectly owned only 49.97 % of HWL. On 3 June 2015, CKHH and HWL completed a reorganisation as a result of which CKHH acquired indirectly the 50.03 % of the shares of HWL it did not own prior to that date. HWL's shares were then delisted from the Hong Kong Stock Exchange and parts of its business were spun off to a separately listed company. An alternative basis to calculate the EU dimension is therefore the pro forma figures of CKHH for the year 2014, that is to say as if the reorganisation had taken place on 1 January 2014. The Notifying Party has also provided these figures for CKHH (EUR 32 482 million worldwide, EUR [...] million EU-wide). The Commission has jurisdiction on the basis of Article 1 and Article 3(1)(b) of the Merger Regulation under both sets of figures.

<sup>8</sup> Joined cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraphs 173-175. See also Commission Notice on Case Referral in respect of concentrations (hereafter, the "Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 7.

<sup>9</sup> Referral Notice, paragraph 8.

<sup>10</sup> Referral Notice, paragraphs 5, 7-9.

whether it is appropriate to refer the present case to the United Kingdom (section 4.3).

- (17) In its assessment of the Referral Request, the Commission takes into account all the arguments it received from the CMA and the Notifying Party.

#### **4.2. Criteria of Article 9(2)(a) of the Merger Regulation**

- (18) In order for a referral request to be issued by a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 9(2)(a) of the Merger Regulation.

- (19) As to the procedural condition, the referral request must be made within 15 working days from the date on which the notification of a concentration before the Commission is received by that Member State. In this regard, the Commission notes that the United Kingdom, via the CMA, received a copy of the notification of the Transaction on 14 September 2015 and that the Referral Request was submitted to the Commission on 2 October 2015. Therefore, the Referral Request was made within 15 working days following the receipt by the United Kingdom of the notification of the Transaction and, consequently, within the deadline provided for in Article 9(2) of the Merger Regulation.

- (20) As to the substantive conditions, first, in assessing a referral request made pursuant to Article 9(2)(a) of the Merger Regulation, the Commission is required to determine whether there is a market within the Member State concerned which is affected by the notified concentration and presents all the characteristics of a distinct market. According to Article 9(3) of the Merger Regulation and the case law of the General Court<sup>11</sup>, the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the transaction threatens to significantly affect competition in that market. Each of these conditions is assessed in turn in the following.

##### *4.2.1. Markets within the United Kingdom which present all the characteristics of a distinct market*

- (21) As regards the criteria set out at Article 9(2)(a), paragraph 36 of the Referral Notice explains that the Member State is required to show that the geographic markets in which the transaction threatens to affect competition are national or narrower than national in scope.

##### *4.2.1.1. CMA's submission*

- (22) On the basis of the Parties' submissions in the notification, in its Referral Request, the CMA submits that the Transaction gives rise to horizontal overlaps in the following markets in the United Kingdom: (i) the market for the provision of mobile telecommunications services to end customers; (ii) the market for the provision of wholesale access and call origination on public mobile telephone networks; and (iii) the wholesale market for international roaming.

---

<sup>11</sup> Joined Cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraph 105.

- (23) The CMA therefore considers that the first condition of the test pursuant to Article 9(2)(a) of the Merger Regulation is met, since the Transaction affects geographic markets that are national in scope.

#### 4.2.1.2. Notifying Party's view

- (24) In its submission to the Commission, the Notifying Party does not take a view as regards the first substantive condition of the legal test pursuant to Article 9(2)(a) of the Merger Regulation.

#### 4.2.1.3. Commission's assessment

- (25) The Commission, on the basis of the information gathered during its first phase market investigation and in light of its previous decision-making practice, reached the preliminary conclusion in the decision adopted pursuant to Article 6(1)(c) of the Merger Regulation, that the relevant product markets for the assessment of the effects of the Transaction are those identified by the CMA, as well as the markets for mobile call termination services and international roaming, and that those markets are indeed national in scope and circumscribed to the territory of the United Kingdom.<sup>12</sup>
- (26) In this respect, the Commission considered that the respective markets are national as the telecommunications infrastructure of the United Kingdom is independent from that of other Member States and mobile telecommunications services in the United Kingdom (as well as in other Member States) are subject to national regulatory regimes.
- (27) In the light of the above, the Commission considers that the United Kingdom has shown that the markets identified in its Referral Request present the characteristics of distinct markets in the United Kingdom as required under Article 9(2)(a) of the Merger Regulation.

#### 4.2.2. *Markets within the United Kingdom in which the Transaction threatens to significantly affect competition*

- (28) According to paragraph 35 of the Referral Notice, to meet the criteria for referral under Article 9(2)(a) of the Merger Regulation, the Member State should demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

##### 4.2.2.1. CMA's submission

- (29) Without prejudice to a full investigation into the competitive effects of the Transaction, the CMA considers that there is a real risk that the Transaction may have a significant adverse impact on competition in the market for retail mobile telecommunications services and in the wholesale market for access and call origination on public mobile networks in the United Kingdom.
- (30) As regards the market for retail mobile telecommunications services, the CMA submits that the Transaction threatens significantly to affect competition in the retail

---

<sup>12</sup> See Article 6(1)(c) Decision, Section 6.

mobile market. First, as regards horizontal effects, the Transaction will reduce the number of Mobile Network Operators ("MNOs") from 4 to 3, with the merged entity gaining a leadership position at national level. Second, as regards vertical effects, the Transaction could weaken the independent distributors on the market, such as Dixons Carphone ("Dixons"), potentially leading to price increases. Third, in terms of coordinated effects, the reduction in the number of MNOs could increase the likelihood of coordinated behaviour between the remaining MNOs.

- (31) As regards the wholesale market for access and call origination on public mobile networks, the CMA submits that the Transaction also threatens significantly to affect competition in this market. As regards horizontal effects, the CMA preliminarily considers that the Transaction will lead to the loss of an important wholesale provider which could be seen as a disruptive force in the market, as Three already hosts two Mobile Virtual Network Operators ("MVNOs") on its network (Dixons and FreedomPop), and has launched a new Mobile Virtual Network Enabler platform.
- (32) Furthermore, the CMA submits that, to the extent that fixed-mobile convergence increases in the future, competing mobile network operators that also offer fixed telecommunication services, namely BT/EE<sup>13</sup> (and, potentially, to a lesser extent Vodafone) may have limited incentive to provide mobile service to competing fixed operators (such as Sky or TalkTalk). In such an environment, the Transaction could represent a reduction in suppliers of wholesale access from three to two (or from two to one absent Vodafone who is also active as a retail supplier of fixed line services).
- (33) In addition, the CMA considers that the reduction in the number of national wholesalers risks having a direct and significant impact on retail prices due to the reduced competitive constraints on MNOs on the wholesale market. In particular, MVNOs may obtain poorer commercial terms as a result of the reduced competition at MNO level. The CMA also considers that MVNOs in the market are unlikely to have sufficient buyer power to be able to compensate for the loss of competition at the MNO level.
- (34) Finally, CMA preliminarily considers that the Transaction threatens to have a significant impact on the network sharing agreements in the United Kingdom (MBNL, concluded between Three and EE and Beacon, concluded between O2 and Vodafone). If the merged entity continues to be part of both agreements, it could have a degree of control over the operations of the networks of the two remaining MNOs, including investment. This situation could materially impact on the ability and incentive for both networks to compete, thereby threatening to affect competition in both the retail and wholesale markets. According to the CMA, the Parties' involvement in both networks may also facilitate information sharing or coordinated behaviour.

#### 4.2.2.2. Notifying Party's view

- (35) The Notifying Party submits that the condition provided by Article 9(2) (a) which requires that "a concentration threatens to affect significantly competition [...]" is not met, as the Transaction does not threaten to affect significantly competition in the retail and wholesale mobile telecommunications markets in the United Kingdom.

---

<sup>13</sup> See section 4.3.1.



Accordingly, the conditions for making a referral under Article 9(2)(a) do not apply in the present case because: (a) the mobile market in the United Kingdom will remain highly competitive post-Transaction: in particular, the Transaction will enable the merged entity to compete aggressively to meet the challenges of the rapidly transforming mobile market in the United Kingdom in a manner that neither party would be able to do absent the Transaction; and (b) contrary to the CMA's view, the Transaction will not increase the likelihood of coordinated behaviour between the remaining MNOs. The Notifying Party submits that the merged entity's network plans post-Transaction will increase information asymmetries between the MNOs in the United Kingdom making the risk of coordination more remote than today.

- (36) Furthermore, as regards the wholesale access and call origination market, the Notifying Party submits that Three is a minor player in this market and the Transaction will not have a real effect on competition in this market. Moreover, Dixons is the only significant MVNO currently hosted on its network. Finally, the Notifying Party claims that, contrary to the CMA's view, the Transaction will not have any impact upon the merged entity's incentives regarding the supply of independent distributors such as Dixons.

#### 4.2.2.3. Commission's assessment

- (37) The Commission considers that the United Kingdom has demonstrated that the Transaction threatens to affect significantly competition in the retail and wholesale mobile telecommunications services markets in the United Kingdom. As explained above, this finding is of preliminary nature and it is without prejudice to the outcome of an in-depth investigation.
- (38) In the decision pursuant to Article 6(1)(c) of the Merger Regulation, the Commission reached the preliminary conclusion that the Transaction raises serious doubts as to its compatibility with the internal market as a result of its effects on the following relevant markets: (i) the market for retail mobile telecommunications services in the United Kingdom in which the Parties' combined market share would amount to 42% by subscribers and 40 % by revenues; and (ii) the wholesale market for access and call origination on public mobile networks in the United Kingdom in which the Parties' combined market share would amount to 53% by revenues. The Commission raised similar concerns to those of the CMA in relation to these markets:
- (39) First, Three and O2 currently compete against each other in the market for retail mobile telecommunications. The Commission had concerns that the Transaction would remove an important competitive force and that the merged entity would have limited incentives to exercise significant competitive pressure on the remaining competitors. This would lead to higher prices and less investment in mobile telecommunications networks.
- (40) Second, in the wholesale market for access and call origination, Three and O2 currently compete against each other and the Transaction would reduce the number of MNOs that are effectively willing to host MVNOs. Prospective and existing MVNOs would have less choice of host networks and hence weaker negotiating power to obtain favourable wholesale access terms.
- (41) Finally, the reduction in the number of competitors following the Transaction risks leading to a weakening of competitive pressure and increased likelihood that MNOs

will coordinate their competitive behaviour and increase prices on a sustainable basis on the retail and wholesale markets.

- (42) On the basis of the foregoing, the Commission considers that the second criterion of Article 9(2)(a) of the Merger Regulation is met, as it has itself concluded in the decision pursuant to Article 6(1)(c) of the Merger Regulation that the Transaction raises serious doubts as to its compatibility with the internal market in relation to these two markets, identified by the CMA in the Referral Request.

*4.2.3. Conclusion on the criteria of Article 9(2)(a) of the Merger Regulation*

- (43) In light of the above, the Commission considers that the criteria for a referral provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to the Transaction.

**4.3. The Commission's discretion whether to refer**

- (44) Pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) are fulfilled with regard to a proposed transaction, the Commission has discretion whether to refer a given case to a national competition authority.

- (45) In the following, the Commission assesses the appropriateness of a referral in the present case in light of the principles set out in the Referral Notice.

*4.3.1. CMA's submission*

- (46) The CMA submits that it would be the more appropriate authority to deal with the Transaction, in particular in the light of the fact that the CMA is already investigating the proposed acquisition by the British incumbent in the telecommunications market BT Group plc ("BT"), of the MNO EE Limited (EE).<sup>14</sup> It submits that if the CMA were to deal with the proposed transactions it would be able to ensure a consistent outcome between the proposed transactions in the United Kingdom. Notably, the CMA submits that if it were to deal with both proposed transactions, it could try to obtain a combined package of commitments from BT and the Notifying Party which could address more comprehensively competition concerns raised by both proposed transactions. Moreover, even if the timing of the review of the two proposed transactions were not to coincide, the CMA submits that, based on its assessment of the Transaction, it could still ask for amendments to any commitments BT could offer. Thus, while any commitments decision in the BT/EE transaction would likely have been taken prior to the completion of the CMA's investigation of the Transaction (should it be referred to the CMA), there would be still scope for a joined outcome as it will be open to the CMA to make modifications to any remedy package in the BT/EE transaction based on assessment of the Transaction.

*4.3.2. Notifying Party's view*

- (47) The Notifying Party submits that the CMA's review of the BT/EE transaction does not provide sufficient justification for the Transaction to be referred to the United Kingdom.

---

<sup>14</sup> Also referred to as the "BT/EE transaction". Together the Transaction and the anticipated acquisition by BT of EE will be referred as the "proposed transactions."

- (48) First, the Notifying Party notes that the timing of the CMA's review of the BT/EE transaction and the timing of Commission's review of the Transaction are disparate.
- (49) Taking into account that the Transaction was notified to the Commission on 11 September 2015, the Transaction could not be referred back to the CMA before November 2015, which would be approximately five months into the CMA's Phase II review of BT/EE transaction, well after the publication of the provisional findings and notice of possible remedies, and approaching the CMA's statutory deadline of 23 November 2015. Consequently, any referral of the Transaction to the CMA would be too late in time to assist the CMA with its analysis of the appropriate counterfactual, substantive issues or potential remedies in the BT/EE case.
- (50) Moreover, the Notifying Party claims that whilst it would be within the remit of the CMA to make modifications to any BT/EE remedies based on its assessment of the Transaction, the CMA does not require jurisdiction over the Transaction in order to make such modifications. As a matter of UK merger control procedure, the CMA may depart from the decision on remedies taken in its final report only where "there has been a material change in circumstances since the preparation of the report or there are special reasons for acting differently". The Notifying Party notes that this is a questionable proposition, as the relevant legislation in the United Kingdom does not foresee any procedure that would allow the remedies in one transaction to be adjusted later as a consequence of an authority's decision in another transaction. The proper approach to the BT/EE case is for the CMA to take a decision on the issues in that case on the basis of the information before it at the time. It should not approach the BT/EE transaction on the basis that it would intend to re-open its remedies decision, shortly after it is taken, in the light of another case. However, in the unlikely event that the CMA needed to use this power it could do so in order to take account of any decision by the Commission. It does not need the transfer of jurisdiction over the Transaction for that purpose. Nevertheless, in light of the fact that the CMA has published its Provisional findings<sup>15</sup> regarding the BT/EE transaction, the Notifying Party considers that the CMA's proposal will no longer be applicable on the facts in any event. This is because the CMA has reached the preliminary conclusion that the proposed acquisition by BT of EE does not give rise to competition concerns in any market in the United Kingdom.
- (51) Second, the Notifying Party considers that the proposed transactions raise different and entirely separate issues: while the Transaction is a horizontal merger between MNOs, the BT/EE transaction is a conglomerate merger. The BT/EE transaction raises the question of what effect the acquisition of EE's mobile business will have on BT's position in the fixed-line market (and vice versa), with one of the most important issues in the case being to what extent BT/EE will have the ability and incentive to hinder competition in mobile backhaul (which is not an issue in the Transaction). The CMA will not therefore need to focus on the effect on competition between the MNOs. As a consequence, it is not the case that one merger can reasonably be evaluated only in close consideration of the other.

---

<sup>15</sup> CMA, Provisional Findings Report on the anticipated acquisition by BT Group plc of EE limited ("Provisional Findings Report"), 28 October 2015, available at: <https://assets.digital.cabinet-office.gov.uk/media/56339544ed915d566a00000f/BT-EE - Provisional findings report.pdf> (published on 30 October 2015).

#### 4.3.3. Commission's assessment

- (52) As explained in recital (42) above, the Commission retains a margin of discretion in deciding whether to refer a case or not.
- (53) As a general point, paragraph 5 of the Referral Notice states that "[...] referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds". Moreover, according to paragraph 8 of the Referral Notice, "[d]ecisions taken with regard to the referral of cases should accordingly take due account of all aspects of the application of the principle of subsidiarity in this context, in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction".
- (54) According to paragraph 9 of the Referral Notice "[...] jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is more appropriate for dealing with the merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority". In this regard, the Referral Notice clarifies that, in addition to the likely geographic localisation of the impact on competition of the merger, "[r]egard may also be had to the implications, in terms of administrative effort, of any contemplated referral".
- (55) Moreover, paragraph 13 of the Referral Notice clearly states that "referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage".
- (56) Finally, the General Court has underlined that the "referral conditions laid down in Article 9(2)(a) and (b) of Regulation 4064/89 should be interpreted restrictively so that referrals to national authorities of concentrations with a Community dimension are limited to exceptional circumstances".<sup>16</sup>
- (57) In light of the above and in exercising its margin of discretion, the Commission considers that, in this case, there are no compelling reasons that justify a referral of the Transaction to the United Kingdom.
- (58) First, as regards the point made by the CMA concerning the necessity of ensuring consistency between the proposed transactions, as well as the possibility of obtaining a better package of commitments that comprehensively addresses competition concerns in both of the proposed transactions (should the referral be granted), the Commission notes that the CMA has already published its preliminary findings report on 28 October 2015 and has reached the preliminary conclusion that the proposed acquisition by BT of EE does not give rise to competition concerns in any market in the United Kingdom.<sup>17</sup> If the preliminary findings are confirmed in the CMA's final decision, commitments will not be necessary. Therefore, the referral to the CMA cannot be justified by the need to ensure consistency in the design of the package of commitments, across the proposed transactions.
- (59) Second, the Commission has a particular interest in ensuring that competition is preserved in a sector, like the one involving mobile telecommunications services that is of crucial importance for the economic development of the Union as shown by the

---

<sup>16</sup> Case T-119/02 *Royal Philips Electronics NV*, paragraph 354.

<sup>17</sup> Preliminary Findings Report, paragraphs 23.1 and 23.2.

adoption of the Digital Agenda for Europe in 2010,<sup>18</sup> as well as of the recent Communication on a Digital Single Market for Europe<sup>19</sup> and of the Regulation on the Telecommunications Single Market in 2015, which contains provisions relating to universal service obligation and international roaming<sup>20</sup>. The Commission also has a strong interest in ensuring consistency in the way the different mergers falling into its competence in this sector are assessed throughout the EU. In that regard, the Commission notes that the telecommunications markets in the EU are characterised by a steady increase in the degree of convergence of telecommunications services and the way in which these services are consumed and delivered,<sup>21</sup> a development requiring the Commission to use its ability to conduct pan-European, holistic assessments of mergers occurring in these sectors.

- (60) Third, the Commission is well placed to deal with the Transaction. The Commission has indeed developed significant expertise in the mobile telecommunications markets in recent years as it has assessed (and is currently assessing) numerous mergers in mobile telecommunications services markets (including cases of in-country consolidation of MNOs, such as that at hand) in several EU Member States.<sup>22</sup> These cases have enabled the Commission to acquire an extensive, thorough and recent knowledge of the sector and a sound understanding of the legal and economic issues raised by this type of case. Moreover, while it is the case that every national market in the mobile telecommunications sectors in the EEA has different characteristics, the majority of the competition issues that are raised by these cases present similarities across Member States. Finally, the Commission is itself active in the implementation of the EU telecoms regulations<sup>23</sup> and therefore has sector-specific thorough and recent knowledge of the telecommunications markets in the Member States, both as a competition authority as well as an institution involved in the regulatory process in these markets.

---

<sup>18</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, 26 August 2010, COM(2010) 245.

<sup>19</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, 6 May 2015, COM(2015) 192.

<sup>20</sup> Regulation (EU) 2015/[...] of [...] laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, which was adopted on 27 October 2015, not yet published in the Official Journal.

<sup>21</sup> See for example, <http://ec.europa.eu/futurium/en/content/estimating-demand-fixed-mobile-bundles-and-switching-costs>.

<sup>22</sup> By way of recent examples, in the mobile telecommunications sector (Cases M.7419 – TeliaSonera / Telenor / JV; M.6992 – Hutchison 3G UK/Telefonica Ireland, M.7018 – Telefonica Deutschland/E-Plus, M. 7421, Orange/Jazztel, M. 7499 – Altice/PT Portugal and M.7637 – Liberty Global/Base Belgium).

<sup>23</sup> For example, by carrying out consultation procedures. Article 7 and Article 7a of the Electronic Communications Framework Directive - 2002/21/EC) require national regulatory authorities to conduct national and EU consultations on draft regulatory measures they intend to take prior to their adoption. These consultations should comprise the definition and analysis of relevant markets, designation of operator(s) having significant market power and the proposed imposition or removal of regulatory remedies on providers of telecoms networks or services. For more information about implementation, please see <http://ec.europa.eu/digital-agenda/en/implementation>

- (61) Fourth, the Commission is actively investigating the Transaction. The Commission agrees with the CMA that the Transaction may raise competition concerns and, on 30 October 2015 has adopted a decision initiating proceedings pursuant to Article 6(1)(c) of the Merger Regulation, whereby it expressed serious doubts as to the compatibility of the Transaction with the internal market. In this context, the Commission already conducted (and is continuing to conduct) an extensive market investigation with competitors and customers of the Parties, as well as other market participants. Several requests of information were sent to the Parties in order to thoroughly investigate the key competition issues raised by the Transaction (including - but not limited to - issues highlighted in the Referral Request). The Commission has also collected and started to review and process a significant volume of internal documents and of economic data from the Parties. Economic data has also been collected from third parties. In addition, the Commission liaised with the CMA before and after the receipt of the Referral Request and will continue to carry out its investigation in close cooperation with the national regulators.
- (62) Finally, the Commission also notes that a referral would entail an additional administrative effort for the Parties, since the need to comply with the requirements of the new procedure before the CMA, after having already complied with the procedure under the Merger Regulation and having submitted a large amount of information, internal documents and data to the Commission.
- (63) In light of the above, the Commission considers that it is the better placed authority to assess the Transaction.

## **5. CONCLUSION**

- (64) In light of the above, while the conditions to request a referral under Article 9(2)(a) Merger Regulation are met, the Commission considers that it is the better placed authority to carry out an investigation of the Transaction, and therefore decides not to refer the case to the competition authority of the United Kingdom.

HAS ADOPTED THIS DECISION:

### *Article 1*

The notified concentration is not referred to the competition authority of the United Kingdom, pursuant to Article 9(3)(b) of Council Regulation (EC) No 139/2004.

### *Article 2*

This Decision is addressed to the competition authority of the United Kingdom.

Done at Brussels, 4.12.2015

*For the Commission*

*(Signed)*

*Margrethe VESTAGER*

*Member of the Commission*